A

PP

v.

CHONG SOON WAH

B

HIGH COURT MALAYA, JOHOR BAHRU
AZAHAR MOHAMED J
[CRIMINAL TRIAL NO: 45-26 & 71-2005]
24 JULY 2007

C

CRIMINAL PROCEDURE: *Dangerous drugs - Trafficking - Element of possession - Drugs found in glove compartment of accused's car - Accused alone in car registered in his name - Presence of dangerous drugs without plausible explanation - Whether gives strong inference that offending exhibits in custody and control of accused - Whether a prima*

D

facie case of actual possession against accused - Dangerous Drugs Act 1952, ss. 37(da), 39B(1)(a)

CRIMINAL PROCEDURE: *Dangerous drugs - Trafficking - Allegation of - Identity of drugs - Whether drugs recovered from glove*

E

compartment different than those examined and analyzed by chemist - Difference in gross of weight of drugs - Whether difference minimal - Whether accused prejudiced - Whether there was a break in chain of evidence as to identity of drugs - Whether prima facie case made out by the prosecution regarding the first charge

F

EVIDENCE: *Information leading to fact discovered - Drugs found in cupboard at a house - Whether there were serious and material contradictions in information allegedly came from accused - Whether exact words spoken by accused satisfactorily probed by prosecution - Evidence Act 1950, s. 27 - Admission - Whether reliable - Whether prejudicial*

G

effect of its admission would outweigh its probative value - Whether prosecution failed to establish prima facie case against accused in second charge

CRIMINAL LAW: *Dangerous drugs - Trafficking - Allegation of -*

H

Defence - Mere denial - Whether accused failed to rebut presumption of trafficking under s. 37(da) of the Dangerous Drugs Act 1952

I

EVIDENCE: *Adverse inference - Evidence Act 1950, s. 114(g) - Non-production of witness - Failure to produce statement of wife of accused - Criminal Procedure Code, s. 112 - Whether s. 112 statement essential to unfolding of account of prosecution case to establish proof against accused - Whether there was basis to suggest prosecution withheld or suppressed statement in possession - Whether non-production of statement succeeded in raising reasonable doubt on prosecution's case*

The accused was charged with trafficking in 49.19 grams of dangerous drugs (the first charge) and 154.25 grams of dangerous drugs (the second charge) under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) and punishable under s. 39B(2) of the same Act. The salient facts adduced by the prosecution showed that on 10 January 2004, acting on information, PW3 had led a team comprising of police personnel to Jalan Danau, Taman Desa Jaya, Johor Bharu. At about 8pm, PW3 saw a Proton Wira (the car) driven by a male, subsequently identified as the accused entering Jalan Danau 1. PW3 followed the car, overtook it and blocked the car. PW3 came out of his vehicle and went to the accused and identified himself as a police officer. A search was conducted on the car and from the glove compartment PW3 recovered a yellowish plastic bag which on examination was found in it a transparent plastic packet containing substances suspected to be heroin which was later confirmed by the chemist to be 43.21 grams of heroin and 5.98 grams of monoacetylmorphines (which formed the subject matter of the first charge). What followed thereafter was that PW3 then read the caution under s. 37A(1)(b) of the Act to the accused with PW5 acting as an interpreter, and asked further questions with the accused giving the answers. As a result of the information given by the accused, PW3, and his men together with the accused went to the accused's house at Jalan Baiduri, Taman Intan, Ulu Tiram. In the hall of the said house PW3 saw there were two women and three children. Upon gaining entry into the house, PW3 brought the accused to the main room whereby PW3 searched the bottom of the cupboard by removing two wooden drawers and at the bottom of the said cupboard found eight newspaper packages containing substances suspected to be heroin which was later confirmed by the chemist to be 103.02 grams heroin and 51.23 grams monoacetylmorphines (which formed the subject matter of the second charge). Section 180(1) of the Criminal Procedure Code ('CPC') said that the standard of proof of the prosecution

A at the close of its case was to make out a *prima facie* case. The issues that arose were (i) whether the accused was aware that he was driving the car with the drugs in the glove compartment; (ii) whether there was doubt that the drugs recovered by PW3 from the glove apartment of the car were different than those that were
B examined and analyzed by PW4 the chemist and subsequently produced at the trial; (iii) whether there were serious and material contradictions in the information which allegedly came from the accused; (iv) whether or not the defence raised a reasonable doubt on the prosecution case.

C

Held:

(1) For the presumption of drug trafficking to come into play under the provisions of s. 37(da) of the Act, the accused must
D be found in possession of the drugs. Possession encompasses the element of physical control as well as an element of knowledge. The accused was the driver of the car and the car was registered in the name of the accused. The accused was the only person in the car at the material time. According to
E PW3, when he introduced himself to the accused as a police officer, the accused became frightened and his hand shivered. The drug was found wrapped in a transparent plastic packet in a yellowish plastic bag from the glove apartment of the accused's car. The presence of the dangerous drugs in the car,
F without a plausible explanation from the accused, would give rise to a very strong inference that at the material time, the offending exhibits were in the custody and control of the accused. Furthermore, the irresistible inference that could be drawn in the circumstances was that the accused all along
G knew about the drugs found in his car. Accordingly, the prosecution had made up a *prima facie* case of actual possession against the accused and in view of s. 37(da) of the Act the accused should be presumed to be trafficking in the said dangerous drugs. (paras 9, 10 & 11)

H **(2)** According to PW4 the chemist, the gross weight of the drugs found in the glove compartment of the car was 458.08 grams whilst PW6 (the investigating officer) said it was 455 grams, giving rise to a difference of 3.08 grams. However, the said difference was a small difference, bearing in mind that PW6
I had explained that he had used a normal weighing instrument. The difference was so minimal; it did not prejudice the

accused. Based on the evidence, there was no doubt that the drugs found by PW3 in the glove compartment of the car were the drugs analyzed by PW4 and were as a matter of fact the drugs produced in court. There was no break in the chain of evidence as to the identity of the drugs in question. As a consequence, the difference in the gross weight did not cast any doubt as to the identity of the drugs in question. Therefore, a *prima facie* case had been made out by the prosecution in respect of the first charge. (paras 12 & 13)

(3) As for the second charge, a close scrutiny of the evidence of PW3 and PW5 revealed that there were serious and material contradictions in the information which allegedly came from the accused. The true substance of the information given by the accused through PW5 was not altogether very clear in the light of the material contradictions. It created a lurking doubt of what was precisely the information that was intended to be conveyed by the accused to PW3. There was a great deal of speculation about the precise information given by the accused to PW3. The exact words spoken by the accused have not been satisfactorily probed by the prosecution. Hence, in the light of the material contradictions and the surrounding circumstances of this case, it was entirely unsafe to rely on s. 27 information. Further, the admission of the s. 27 information would result in unfairness and prejudice. The prejudicial effect of its admission would certainly outweigh its probative value and out of proportion to its evidential value. The prosecution had failed to establish a *prima facie* case against the accused in respect of the second charge. (paras 20 & 21)

(4) The main thrust of the accused's defence was that the accused had no knowledge of the dangerous drugs found in the glove compartment of the car. However, having regard to the surrounding circumstances, the spontaneous reaction taken together pointed to the accused having known of the presence of the drugs in the glove compartment before its discovery, indicative in so doing of a feeling of culpability. It was a reaction driven by guilt. It could not be accepted at full face value the statement of the accused to PW3 that he had no knowledge of the drugs found in the glove compartment and that his wife had just used the car. The evidence of the accused having knowledge of the presence of the drugs in the

car was overwhelmingly strong. There was no evidence whatsoever to connect his wife with the drugs. The story that the drugs could have been hidden or concealed there by his wife having access to the car in his absence was rejected. The defence had failed to raise a reasonable doubt on the prosecution case. (paras 29 & 34)

(5) The non- production of the accused's wife as a witness by the prosecution was on account of the failure to subpoena as explained by PW6 the investigating officer in his testimony. The non-production of this witness was not as a result of withholding or suppression of evidence. Moreover, there was no oblique motive on the part of the prosecution in not producing this witness. It was only a conjecture or fanciful possibility to connect the accused's wife with the drugs found in the glove compartment of the car. As a result, the non-production of the accused's wife had not succeeded in raising a reasonable doubt on the prosecution case. (para 35)

(6) The s. 112 statement of the accused's wife was not essential to the unfolding of the account of the prosecution case to establish proof against the accused beyond all reasonable doubt. There was no basis to suggest that the prosecution had withheld or suppressed the statement in their possession so as to raise an adverse inference under s. 114(g) of the Evidence Act 1950. The non-production of the statement of the accused's wife had also not succeeded in raising a reasonable doubt on the prosecution case. (para 36)

(7) The totality of the evidence, the surrounding circumstances and the conduct of the accused when taken together irresistibly pointed to the accused having knowledge of the offending exhibits at the material time. The evidence did not leave any questions unanswered and for this reason the accused had not raised any reasonable doubt on the prosecution case. The accused had failed on a balance of probabilities to rebut the presumption of trafficking under s. 37(da) of the Act. The accused at the material time was carrying in his car the drugs from one point to another. The accused was without a doubt a drug trafficker within the meaning of the Act. (paras 37 & 38)

(8) The prosecution had proved its case against the accused beyond reasonable doubt for the offence (the first charge) with which he was charged; he was guilty as charged and was convicted thereof. This court handed out the mandatory sentence of death and pursuant to s. 277 of the CPC, the accused should be hanged by the neck till he is dead. (paras 39 & 40)

Order accordingly.]

Case(s) referred to:
Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(dist)***
Azahan Mohd Aminallah v. PP [2005] 1 CLJ 374 CA ***(refd)***
Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(dist)***
Hasamuddin Talena v. PP [2002] 2 CLJ 504 CA ***(refd)***
Lee Boon Gan v. Regina [1954] 1 LNS 39 HC ***(refd)***
Md Desa Hashim v. PP [1995] 4 CLJ 677 FC ***(refd)***
Miller v. Minister of Pensions [1947] 2 All ER 372 ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***
Pang Chee Meng v. PP [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265 SC ***(dist)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Saimin & Ors [1971] 1 LNS 115 HC ***(refd)***
R v. Sang [1979] 2 All ER 1222 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 180(1), 182A, 257(1), 277
Dangerous Drugs Act 1952, ss. 2, 6, 37A(1)(b), 37(d), (da), 39B(1)(a), 39B(2)
Evidence Act 1950, ss. 27, 114(g)

For the accused - Hisham Teh Poh Teik; M/s Teh Poh Teik & Co
For the prosecution - Ian Shang Kuan Chou Chuen DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Azahar Mohamed J:

[1] The accused, Chong Soon Wah was charged with trafficking in 49.19 grams of dangerous drugs (the first charge) and 154.25 grams of dangerous drugs (the second charge) under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) and punishable under

s. 39B(2) of the same Act. He claimed trial to both the charges. The charges were jointly tried before me. The charges read as follows:

First Charge (No: 45-26-2005)

Bahawa kamu pada 10 Januari 2004, jam lebih kurang 8.00 malam, di persimpangan Jalan Danau 1 dan Danau 4, Taman Desa Jaya, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, telah didapati mengedar 49.19 gram (43.21 gram Heroin, 5.98 gram Monoacetylmorphines), dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

Second Charge (No: 45-71-2005)

Bahawa kamu pada 10 Januari 2004, jam lebih kurang 8.30 malam, di alamat No. 17, Jalan Baiduri, Taman Intan, Ulu Tiram, di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Takzim, telah didapati mengedar dadah berbahaya iaitu sejumlah 154.25 gram (103.02 gram Heroin, 51.23 gram Monoacetylmorphines) dan oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[2] To begin with, here are the salient facts adduced by the prosecution which can be summarized as follows. On 10 January 2004 acting on information, ASP Charun Ai Been (PW3) led a team comprising of eight other police personnel to Jalan Danau 1, Taman Desa Jaya, Johor Bahru in three vehicles. They arrived there at about 7.30pm. PW3 and his men were divided into three groups. They then took up their respective positions. Not long after that, at about 8pm, PW3 saw a Proton Wira No. JGD 8732 (the car) driven by a male, subsequently identified as the accused entering Jalan Danau 1 and passed PW3's vehicle. PW3 then followed the car in his vehicle. The other two other police vehicles followed behind PW3's. When the car came to Jalan Danau 4, PW3's vehicle overtook it and when it approached the junction between Jalan Danau 4 and Jalan Danau, PW3's vehicle stopped and blocked the car. Another police vehicle then stopped at the driver's side of the car.

[3] PW3 came out of his vehicle and went to the accused and identified himself as police officer. At that point, according to PW3 on opening the door to the car the accused looked frightened and his hand shivered. The accused was ordered out of the car. A body search was done on him but nothing incriminating was found.

[4] A search was then done on the car. Then, after that from the glove compartment PW3 recovered a yellowish plastic bag which on examination was found in it a transparent plastic packet containing substances suspected to be heroin which was later confirmed by the chemist to be 43.21 grams of heroin and 5.98 grams of monoacetylmorphines. This formed the subject matter of the first charge. The accused was then handcuffed. The other parts of the car were then searched.

[5] What follows thereafter was that PW3 then read the caution under s. 37A(1)(b) of the Act to the accused with L/Kpl. Chew Kooi Hwa (PW5) acting as an interpreter. PW3 then testified he asked the accused where his house was. The accused was said to have replied at No. 17, Jalan Baiduri 5, Taman Intan, Ulu Tiram. PW3 then asked further questions with the accused giving the answers, about which more will be said further on at a later stage.

[6] Then, thereafter as a result of the information given by the accused, PW3 and his men together with the accused went to the accused's house at No. 17, Jalan Baiduri 5, Taman Intan, Ulu Tiram. Upon arrival at the aforesaid address, PW3 found that the gate was opened. The main wooden door to the house was ajar. Only the grille was locked. In the hall of the said house PW3 saw there were two women and three children. One of the women unlocked the grille and upon gaining entry into the house, PW3 brought the accused to the main room. PW3 then searched the bottom of the cupboard by removing two wooden drawers. PW3 then searched the empty space at the bottom of the cupboard and found eight newspaper packages, each wrapping a transparent plastic packet containing substances suspected to be heroin which was later confirmed by the chemist to be 103.02 grams heroin and 51.23 grams monoacetylmorphines. This formed the subject matter of the second charge charge. A search was made in respect of the kitchen and on its floor, PW3 found a white plastic bag which contained RM18,000.

[7] That is in summary the facts presented by the prosecution at the conclusion of its case. Now, s. 180(1) of the Criminal Procedure Code (the CPC) says that the standard of proof on the prosecution at the close of its case is to make out a *prima facie* case. Section 180 says:

> (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.
>
> (2) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.
>
> (3) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

[8] With regard to the identity and the weight of the offending substances, En. Muhammad Yazid bin Ibrahim (PW4), a chemist had testified that he had thoroughly examined and analyzed the substances. He conducted qualitative and quantitative tests to determine the type and weight of drugs contained in the substances submitted to him by Insp. Mohamed Nasir bin Jappiry (PW6), the investigating officer. From the tests, he concluded and found out that in respect of the substances relating to the first charge they contained 43.21 grams heroin and 5.98 grams monoacetylmorphines and in respect of the substances relating to the second charge they contained 103.02 grams heroin and 51.23 grams monoacetylmorphines. According to PW4 heroin and monoacetylmorphines are dangerous drugs listed in the first schedule of the Act. PW4 had been a chemist with the Chemistry Department for many years. He possessed a B.Sc degree majoring in chemistry and had given expert evidence in court in numerous occasions. His expert evidence had been accepted in other drugs cases. I accept his findings with regard to the technique of identification and method of analysis of the drugs, I am satisfied that the analysis was properly conducted by PW4 and cannot be faulted. There is no evidence from other expert to challenge or contradict PW4's findings. I therefore accept his findings as true and accurate.

[9] Now it is time to consider the first charge. The key question is whether the accused were aware that he was driving the car with the drugs in the glove compartment. For the presumption of drug trafficking to come into play under the provisions of s. 37(da) of the Act, the accused must be found in possession of the drugs. Possession under the provision must be proved by convincing, credible and admissible evidence and cannot arise out of legal presumption. Possession encompasses the element of physical control as well as an element of knowledge. Thus, knowledge constitutes an essential ingredient of possession under s. 37(da) of the Act. Possession incorporates the element of knowledge and without knowledge there can never be possession under the Act. Knowledge is a matter of fact, which in the nature of things cannot be proved by direct evidence. It can only be proved by inferences from the surrounding circumstances. Here is an illustration of this point. In *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337, the accused was arrested on 9 May 1996 at about 3.30am at Jalan Kubur, Bakar Batu, Johor Bahru, moments after alighting from the car he was driving. Upon searching the car, the police party found three packages of compressed plant materials from under the driver's and the front passenger's seats, which were later confirmed to be 4826.9 grammes of cannabis as defined under s. 2 of the Act. The accused was charged with and convicted of an offence of trafficking in the said offensive drugs under s. 39B(1)(a) of the Act and was sentenced to death. In convicting the accused thus, the High Court found that the accused must have custody and control of the drugs, since he was alone at the material time and was in possession of the car for some seven months prior to his arrest. The High Court also ruled, based on the cautioned statement which the court admitted into evidence and in which the accused had confessed to transporting the said cannabis to Jalan Kubur for sale, that the element of trafficking as defined in s. 2 of the Act was satisfied. Further, the High Court also rejected the accused's story that the packages of cannabis were placed in the car by one Jiri who told him that they were cloth samples meant for the accused's employer in Kuala Terengganu, or that, although he knew about the existence of the packages in the car he did not know that they contained cannabis. The High Court's decision was on appeal disturbed by the Court of Appeal. The Court of Appeal agreed with the High Court on the issue of custody and control, but faulted the court for admitting and relying on the accused's cautioned statement.

The facts, according to the Court of Appeal, could not sustain a charge of trafficking, since, to establish possession for the purpose of the Act, there has to be established knowledge of the drugs by the accused (the trial judge did not make any finding on the issue of knowledge necessary to establish possession on account of his reliance on the cautioned statement). Be that as it may, the Court of Appeal deemed it proper and warranted to rely on the presumption under s. 37(d) of the Act, and in the circumstances ruled that the accused was in presumed possession of the drugs. The Court of Appeal, hence, substituted the conviction with one of possession under s. 6 of the Act and commuted the sentence to 18 years imprisonment and ten strokes of the rotan. Being dissatisfied, the prosecution appealed to the Federal Court and argued, primarily, that in the circumstances of the case, independent of the presumption under s. 37(d) of the Act, there was ample evidence for the court to draw an inference that the accused knew what was contained in the three packages in question. The important point to note here is that the Federal Court held, *inter alia*, that the incontrovertible facts as found by the High Court was that the three packages were found in the car driven by the accused, that the accused was the only person in the car at the material time, that one package was found under the driver's seat and two packages under the passenger's seat and that the car was in the possession of the accused for more than seven months prior to his arrest. According to the Federal Court that under the circumstances, the High Court was right in holding that at the material time the packages were in the custody and control of the accused. Because it is important to the issue at hand, I should like to emphasis that it was also held by the Federal Court the irresistible inference to be drawn in the circumstances of the present case is that the accused all along knew about the drugs found in the car. According to the Federal Court fact that they were found hidden under the seats of the car and wrapped in Chinese newspaper would not assist him to negate such an inference. The Federal Court said that from the evidence of PW5 it is clear that little effort was required to uncover what was contained in the three packages. The Federal Court held that consequently, the High Court, properly directed on the law, would have come to the finding that *prima facie* the respondent had possession of the drugs independent of the statutory presumption under s. 37(d) of the Act.

[10] Turning to the present case, the following factual matrix is relevant. The accused was the driver of the car. The car was registered in the name of the accused. The accused was the only person in the car at the material time. According to PW3, when he introduced himself to the accused as a police officer the accused became frightened and his hand shivered. The drug was found wrapped in a transparent plastic packet in a yellowish plastic bag from the glove compartment of the accused's car.

[11] The judgment of the Federal Court in *PP v. Abdul Rahman Akif* represents the law as we apply to-day. Applying the principle as set out in *PP v. Abdul Rahman Akif*, it is my judgment that the presence of the dangerous drugs in the car, without a plausible explanation from the accused, would give rise to a very strong inference that at the material time the offending exhibits were in the custody and control of the accused. Furthermore, the irresistible inference that can be drawn in the circumstances is that the accused all along knew about the drugs found in his car. Accordingly, I ruled that the prosecution had made up a *prima facie* case of actual possession against the accused and in view of s. 37(da) of the Act the accused shall be presumed, until the contrary is proved, to be trafficking in the said dangerous drugs.

[12] There is one point raised by learned counsel for the accused. He had drawn to my attention to the gross weight of the drugs found in the glove compartment of the car. PW4 (the chemist) said it was 458.08 grams whilst PW6 (the investigating officer) said it was 455 grams, giving rise to a difference of 3.08 grams. What's the effect? Did it give rise to a doubt that the drugs are not the drugs that were recovered by PW3 from the glove compartment of the car and that were examined and analyzed by PW4 and subsequently produced at the trial by the prosecution? I do not think so. The difference of 3.08 grams in weight was a small difference, bearing in mind that PW6 had explained that he had used a normal weighing instrument. The difference was so minimal; it did not prejudice the accused. But most importantly, based on the evidence of PW2, PW3, PW4 and PW6, there cannot be any doubt that the drugs found by PW3 in the glove compartment of the car were the drugs analyzed by PW4 and were as a matter of fact the drugs produced in court. The exhibits were properly sealed and marked with identification numbers by PW3 and PW6. PW3 also testified that he put his signature and

A date on the various exhibits. Adequate steps were taken by PW4 and PW6 to ensure that the exhibits were not tempered with. There was no break in the chain of evidence as to the identity of the drugs in question. As a consequence, the difference in the gross weight did not cast any doubt as to the identity of the B drugs in question.

[13] I was therefore satisfied that at the close of the case for the prosecution, a *prima facie* case had been made out by the prosecution in respect of the first charge and accordingly, the C accused was called upon to enter his defence.

[14] Next, I move on to deal with the second charge. In respect of the second charge, the prosecution's case rested entirely on the evidence of PW3 who testified on the discovery of the incriminating offending exhibits in the house as a result of D information given by the accused himself during his interrogation by PW3 (the s. 27 information). Section 27 of the Evidence Act 1950 (the Evidence Act) says:

> (1) When any fact is deposed to as discovered in consequence of E information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

F **[15]** The rationale behind this section revolves on the footing that if a fact is actually discovered in consequence of information given by the accused in custody, some degree of guarantee is afforded thereby that the information was true and accordingly can be safely allowed to be given in evidence over-riding the CPC and other written laws (per Abdul Hamid LP in *Pang Chee Meng v. PP* G [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265). In *Md Desa Hashim v. PP* [1995] 4 CLJ 677, the Federal Court observed, *inter alia*, that by reason of s. 27, so much of a statement made by an accused in police custody as leads to the discovery of a fact, notwithstanding that it amounts to a confession, is admissible in H evidence. The Federal Court added that when admitted, it may go to prove such facts as are relevant to bring home the charge and these include, but are not confined to, knowledge on the part of an accused of certain relevant matters, the fact that the accused had possession of the article found or that the article in question I was under his control. But there is this important qualification to be made. The information given by the accused must be exact and

recorded in the language or words used by the accused. The exact words spoken by the accused have to be proved and no court should allow one word more to be deposed by the police than it is absolutely necessary to show how the facts discovered is connected with the accused (see: *Hasamuddin Talena v. PP* [2002] 2 CLJ 504). The rationale of the strictness of the rule can be found in *Pang Chee Meng v. Public Prosecutor*, where the Federal Court said that in invoking s. 27 of the Evidence Act, the courts should be very vigilant to ensure the credibility of the evidence by the police personnel in respect of the section, which is so vulnerable to abuse.

[16] Reverting to the present case, upon a perusal of the evidence of PW3, PW5 and the written information, I am of the view that there are serious discrepancies in the alleged answers given by the accused, which the learned DPP contended led to the discovery of the drugs in the empty space at the bottom of the cupboard in the accused's house. It was PWS's evidence that he read the caution under s. 37A(1)(b) of the Act to the accused with PW5 acting as an interpreter. PW3 then testified he asked the accused where his house was. The accused was said to have answered at No. 17, Jalan Baiduri 5, Taman Intan, Ulu Tiram. PW3 then asked further questions with the accused giving the answers. Both the questions and answers are now reproduced:

Q: Adakah apa-apa lagi barang salah di rumah tersebut?

A: Ada 7 atau 8 pau lagi pek hoon di rumahnya.

Q: Di mana kamu simpan itu pek hoon?

A: Pek Hoon disimpan di bawah almari dalam bilik tidur.

[17] When the court resumed in the afternoon of 16 August 2007 PW3 was again asked in respect of the questions and answers. His version is now reproduced:

Q: Di manakah rumah kamu?

A: Di No. 17, Jalan Baiduri 5, Taman Intan, Ulu Tiram.

Q: Ada apa lagi barang salah?

A: Ada 7 atau 8 pau lagi pek hoon.

Q: Di mana kamu simpan itu pek hoon?

A: Saya simpan di bawah almari dalam bilik saya.

[18] PW3 said that he reduced the questions and answers onto a piece of paper (exh. P17). Exhibit P17 is produced in its entirety and it reads as follows:

> Pada 10/9/2004 jam lebih kurang 2010 hrs saya bacakan kata-kata amaran di bawah Seksyen 37A(1)(b) dan 37A(2) Akta Dadah Berbahaya kepada penama Chong Soon Wah K/P: 731021-01-5279 dan tanya soalan berikut:
>
> Q: Di mana rumah kamu?
>
> A: Di 17, Jalan Baiduri 5, Taman Intan, Ulu Tiram, Johor.
>
> Q: Ada apa barang salah lagi di rumah?
>
> A: Ada 7 atau 8 pau pek hoon.
>
> Q: Di mana kamu simpan itu pek hoon?
>
> A: Di bawah almari dalam bilik saya.

[19] PW3 said all the above were interpreted by PW5. PW5's version as regards the questions and answers are as follows:

> Q: Di mana rumah kamu?
>
> A: No. 17, Jalan Baiduri 5, Taman Intan, Ulu Tiram, Johor.
>
> Q: Ada barang salah lagi di rumah?
>
> A: Ada 7 atau 8 pau pek hoon.
>
> Q: Di mana kamu simpan pek hoon?
>
> A: Di bawah laci almari bilik saya.

[20] A close scrutiny of the evidence of PW3 and PW5 will reveal that there are serious and material contradictions in the information which allegedly came from the accused. The contradictions are obvious. The first version of the accused's answer to PW3: "Pek Hoon disimpan di bawah almari bilik tidur". The second version of the accused's answer to PW3: "Saya simpan di bawah almari dalam bilik saya". The third version of the accused's answer as recorded in P17: "di bawah almari dalam bilik saya". More significantly, the evidence of PW5 will further reveal a fourth version: "di bawah laci almari bilik saya". On being shown that his oral testimony with regard to the accused's answer differed from P17, PW5 answered "saya keliru". Such an excuse does not inspire confidence bearing in mind that s. 27 information, as

remind by the Federal Court in *Pang Chee Meng v. Public Prosecutor*, is so vulnerable to abuse. In consequence, I would treat the evidence of PW5 in this respect with extreme caution.

[21] Whilst I can accept the exact questions posed by PW3 to the accused, the true substance of the information given by the accused through PW5 is not altogether very clear in the light of the material contradictions that I have discussed earlier. It created a lurking doubt in my mind of what precisely the information that was intended to be conveyed by the accused to PW3. There is a great deal of speculation about the precise information given by the accused to PW3. In my judgment, the exact words spoken by the accused have not been satisfactorily proved by the prosecution. Hence, there is substance in the argument of learned counsel for the accused that s. 27 information is unreliable. In my view, in the light of the material contradictions and the surrounding circumstances of this case, it is entirely unsafe to rely on s. 27 information. Further on this point, the admission of the s. 27 information would result in unfairness and prejudice. To my mind the prejudicial effect of its admission would certainly outweigh its probative value and out of proportion to its evidential value (see: *R v. Sang* [1979] 2 All ER 1222 and *Goi Ching Ang v. PP* [1999] 1 CLJ 829). For the reasons aforesaid I found that the prosecution had failed to establish a *prima facie* case against the accused in respect of the second charge. Accordingly, the accused was acquitted and discharged.

[22] Continuing with the sequence of events in the proceedings before me regarding the first charge, when the court called on the accused to make his defence, he elected to make an unsworn statement from the dock. In substance, what the accused said was this. On 10 January 2004 he stayed at No. 17, Jalan Baiduri, Taman Intan, Ulu Tiram with his wife, mother in law and three children. He had a Proton Wira JGD 8732. His wife possessed a driving licence and the car was jointly used by both, him and his wife. There were two sets of keys to the car, one set being kept in the shared room and the other was usually kept on the altar as can be seen from the photographs exh. P10C. His wife had access to the car. On 10 January 2004 at about 4pm his wife had driven the car. At about 6.30pm his wife returned together with their eldest daughter from school. He and his family had dinner. While having dinner, he received a phone call from his friend Ah Wei, a renovation contractor. Ah Wei wanted to see him in one

of the coffee shops along Jalan Danau 1 at about 8pm to discuss a renovation sub-contract. At about 7.30pm he drove his car to meet Ah Wei. He drove his car coming from Jalan Danau into Jalan Danau 1 and followed the route as described by PW3. He made one round as he did not see Ah Wei. His car was subsequently blocked by the police cars at the place marked 'X' in the sketch plan (P16). He was asked by PW3 to come out of the car. A body search was done, nothing incriminating was found. It was not true that he was in a state of fear and that his hand shivered after PW3 had identified himself. He said he was shocked at the manner his car was blocked. PW3 searched the car and from the glove compartment of the car PW3 found the drugs exhibit as shown in exh. P6B. PW3 informed him that it was drugs. He felt frightened and later he told PW3 that he had no knowledge of the drugs found in the glove compartment and that his wife had just used the car. He had absolutely no knowledge of the drugs found in the glove compartment. The drugs did not belong to him. He did not keep it there and his wife too had access to the car.

[23] In essence the defence of the accused in the unsworn statement is that he had no knowledge of the presence of the drugs in the glove compartment as he had no exclusive use of the car as his wife, had access to the car and in fact had driven the car before he drove it on the material date.

[24] In his defence the accused had also called two witnesses. Tengku Mahmood bin Tengku Suleiman (DW2) is an officer from the Jabatan Pengangkutan Jalan. He confirmed that the accused's wife had been issued with a driving license in respect of two classes of vehicles, motorcycle and motorcar. Mr. Chong Gee Leng (DW3) is the father of the accused. He testified that he had been to the house of the accused and he had seen the wife driving the accused's car.

[25] Now, at the close of the trial, the court shall take into account all the evidence adduced before it. Section 182A the CPC says:

> (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

(2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.

(3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[26] This is a good place to begin with the discussion of the submission of learned counsel for the accused. The main thrust of his argument is this. The accused had no knowledge of the dangerous drugs found in the glove compartment of the car. Learned counsel drew my attention to the following circumstances to support his argument. First, the wife had access to the car just before the accused drove it and she could have concealed the drugs in the glove compartment. Second, at the time the accused was confronted by PW3 he had informed PW3 that he had no knowledge and that his wife had driven the car before he did. This shows that he had declared his defence the moment he was arrested. Third, there is weight or probative value to the unsworn statement given by the accused as it was supported by the prosecution's led evidence and the evidence of DW2 and DW3. Fourth, the failure of the prosecution to call his wife or to tender her s. 112 statement has lent weight to the defence raising a reasonable doubt.

[27] Now, a statement from the dock is not a sworn statement which can be the subject of cross-examination. Nonetheless, a statement from the dock is evidence for the purpose of a trial. The court can attach to it such significance as it thinks fit, depend on the particular circumstances of each case. It cannot be disregarded on the ground that it is an unsworn statement. As a consequence, it is the duty of the court at the conclusion of the trial to take into consideration the unsworn statement and all the other evidence in deciding whether the prosecution has proved its case beyond reasonable doubt. This is made clear by the Court of Appeal in *Azahan Mohd Aminallah v. PP* [2005] 1 CLJ 374 where Gopal Sri Ram JCA speaking in the context of s. 257(1) of the CPC said:

However, there are other aspects of this case, special to its facts that need to be addressed. One of these has to do with the failure of the sessions court to act in accordance with section 257(1) of the Code. The section is most relevant to this case because, as we have already pointed out in paragraph 2 of this judgment the appellant was undefended by counsel. The section reads:

> At every trial before the court of a magistrate if and when the court calls upon the accused for his defence it shall, if he is not represented by an advocate, inform him of his right to give evidence on his own behalf, and if he elects to give evidence on his own behalf shall call his attention to the principal points in the evidence for the prosecution which tell against him in order that he may have an opportunity of explaining them.

15. The first point to note about the section is that it has no parallel in either the Indian or the Singapore Criminal Procedure Codes. The second is that the section only casts a burden on the court if the accused – to quote the section – "elects to give evidence". The critical question at issue here is whether the appellant who elected to make an unsworn statement from the dock "elected to give evidence".

16. Without going into the matter in any detail, it suffices for us to say that there is a conflict among the High Courts as to whether an unsworn statement from the dock is evidence. *Wong Heng Fatt v. Public Prosecutor* [1959] MLJ 20, *Public Prosecutor v. Sanassi* [1970] 2 MLJ 198 and *Low Thim Fatt v. Public Prosecutor* [1989] 1 MLJ 304 say that it is not evidence. By contrast, Chang Min Tat J in *Ng Hoi Cheu v. Public Prosecutor* [1968] 1 MLJ 53 held that it is evidence. And there are *dicta* in many other cases, Malaysian, Australian and at least one decided by the Privy Council which says quite emphatically that such an unsworn statement is evidence for the purposes of a trial. All the relevant cases may be found in two articles published in the Malayan Law Journal. The first is that by that very learned scholar Professor Ahmad Ibrahim in [1975] 2 MLJ vi. The other is by Professor Mohd Akram in [2003] 1 MLJ clxix.

17. In our judgment, in the context of section 257(1) the critical phrase is "elects to give evidence" and not "elects to give evidence on oath". The former is much wider than the latter and must *ex necessitate rei* include the making of an unsworn statement from the dock. We are therefore persuaded that the reasoning of Chang Min Tat J in *Ng Hoi Cheu v. Public Prosecutor* is correct. Accordingly, the fact that the appellant elected to make an unsworn statement from the dock did not exclude the operation of section 257(1).

[28] According to the accused at about 4pm on the material date his wife had driven the car and that only at about 6.30pm his wife returned together with their eldest daughter from school. Since the statement is not sworn evidence and not tested by cross-

examination, I am not prepared to accept the accused's version as to the time his wife used the car. I agree with the observation made by Spenser Wilkinson J in the case of *Lee Boon Gan (F) v. Regina* [1954] 1 LNS 39 that there can be very few cases in which a statement made by the accused from the dock, which cannot be tested by cross-examination, can by itself amount to proof of anything. Nevertheless, I am inclined to accept the evidence given by DW3 that he saw the accused's wife driving the car in the morning on the day the accused was apprehended. And so, it is true that in the morning on the day in question the accused's wife had access to the car and in fact had driven it.

[29] On the other hand, as against the evidence of the access to the car by the accused's wife, the fact to be kept in mind, however, is the irrefutable factual situation in this case, that is to say, on the date, and at the time and place mentioned in the first charge the accused was the driver of the car and the sole occupant thereof. And tellingly, is the evidence of a compelling kind against the accused. It is the demeanour of the accused when confronted by PW3. According to PW3, when he introduced himself to the accused as a police officer by showing his authority card and more importantly before the drugs was found, it was at that moment the accused became frightened and his hand shivered. In his unsworn statement the accused denied that he was in a state of fear and that his hand shivered after PW3 had identified himself. The accused said he was actually shocked at the manner his car was blocked. In this regard, to my mind, PW3 who is a public officer merely testified on what he actually saw at the material time. That was the conduct of the accused as seen by PW3. In the absence of any contradictions and in the absence of any inherent improbability, I accept PW3's evidence as credible. I reject the unsworn statement of the accused on this aspect. The accused lied on this point. To my mind, having regard to the surrounding circumstances, that, spontaneous reaction taken together point to the accused having known of the presence of the drugs in the glove compartment before its discovery, indicative in so doing of a feeling of culpability. In other words, it was a reaction driven by guilt. That's why I cannot accept at full face value the statement of the accused to PW3 that he had no knowledge of the drugs found in the glove compartment and that his wife had just used the car. To my mind, the evidence of the accused having knowledge of the

presence of the drugs in the car is overwhelmingly strong. The accused had all the reason to hold back the truth and to lie to PW3 at the expense of his wife. It was a self serving response to project the impression of his innocence upon PW3 announcing the discovery of the drugs in the glove compartment.

[30] It is a well established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove its case beyond reasonable doubt the guilt of the accused for the offence with which he is charged. To secure an acquittal, the accused's duty is simply to cast a reasonable doubt on the prosecution case. In *Mohamad Radhi Yaakob v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 Mohd Azmi SCJ said:

> We are of the view that whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial Judge must in accordance with the principle laid down in *Mat v. PP* [1963] 1 LNS 82 go one step further before convicting the accused by giving due consideration as to why the defence story though could not be believed did not raise a reasonable doubt on the prosecution case. Thus, even though a Judge does not accept or believe the accused explanation, the accused must not be convicted until the Court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case.
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> It is a well established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution case.
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> To earn an acquittal, the Court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice. It is not, however, wrong for the Court to be convinced that the defence version is true, in which case the Court must order an acquittal. In appropriate cases it is also not wrong for the Court to conclude that the defence story is false or not convincing, but in that instance, the Court must not convict until it asks a further question that even if the Court does not accept or believe the defence explanation, does it nevertheless, raise a reasonable doubt as to his guilt? It is for this reason that in dealing with the defence story or explanation, the

majority of Judges rightly prefer to adopt straight away the legally established "reasonable doubt" test, rather than to delve in the "believable and convincing" test before applying the "reasonable doubt" test.

[31] Here I come to the critical issue: whether or not the defence has raised a reasonable doubt on the prosecution case. In this regard, I attach importance to the fact that since the accused's wife had access to the car, she was a possible suspect. I consider the possibility that she might have placed and concealed the drugs in the glove compartment for an unknown motive. Of course motive is something not easy to establish. In his unsworn statement the accused made a faint insinuation of the possibility the drugs were placed by his wife, and that could be the reason why she was scared to come to court. On the contrary, in his unsworn statement the accused said that at the material time he stayed at No. 17, Jalan Baiduri, Taman Intan, Ulu Tiram with his wife, mother in law and three children. They stayed together as part of a family. His wife possessed a driving licence and the car is jointly used by both and him and his wife. There were two sets of keys to the car. His wife had access to the car. According to the accused, he and his family had dinner together on that day. This shows that their relationship was anything but normal. Further on this point, DW3 said that the relationship of the accused and his wife was good and that they have three children in which the youngest was born less than a month before the accused was arrested.

[32] To appreciate the significance of the meaning of the expression reasonable doubt, I refer to the case of *Public Prosecutor v. Saimin & Ors* [1971] 1 LNS 115 where Sharma J described it in these words:

> It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.
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> It has again been said that "reasonable doubt" is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its

> parts, you say to yourself I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there.' Or as sometimes said, it must be a doubt as solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.

[33] In *Miller v. Minister of Pensions* [1947] 2 All ER 372, Denning J (as he then was) said:

> That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable," the case is proved beyond reasonable doubt, but nothing short of that will suffice.

[34] Coming back, then, to the critical issue, to my mind, having regard to the surrounding circumstances of the present case and in the non-existence of any evidence whatsoever, it cannot by any stretch of imagination to think a wife who has a good relationship with her husband and for a mother whom has just given birth. In my view, for that reason, the insinuation without more remains no more than an insinuation. There was no evidence whatsoever to connect his wife with the drugs. It is possible to suggest that his wife had placed the drugs in the glove compartment, but having regard to the surrounding circumstances, and to make use of Lord Denning's words in *Miller v. Minister of Pensions*, it is only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable,". I have given a thorough consideration to such a possibility. I reject the story that the drugs could have been hidden or concealed there by his wife having access to the car in his absence. Having regard to the circumstances of the present case, I look upon this as no higher than a conjecture or fanciful possibility. I see no alternative but to dismiss it. In my judgment the defence has failed to raise a reasonable doubt on the prosecution case.

[35] This brings me to the argument by learned counsel for the accused that the failure of the prosecution to call the accused's wife or to tender her s. 112 statement has lent weight to defence raising a reasonable doubt. The significant point that should be noted here is that the non-production of this witness by the prosecution is on account of the failure to subpoena as explained by PW6, the investigating officer in his testimony. In my view the non-production of this witness is not as a result of withholding or suppression of evidence. Moreover, I do not detect any oblique motive on the part of the prosecution in not producing this witness. As I have said a moment ago it is only a conjecture or fanciful possibility to connect the accused's wife with the drugs found in the glove compartment of the car. As a result, the non-production of the accused's wife has not succeeded in raising a reasonable doubt on the prosecution case. This is not a case where a reasonable doubt arises as a result of the prosecution's failure to call a particular witness, such as in the cases of *Pang Chee Meng v. PP* [1992] 1 CLJ 39; [1992] 1 CLJ (Rep) 265, *Gooi Loo Seng v. PP* [1993] 3 CLJ 1 and *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 which are distinguishable on their facts.

[36] Another aspect of the argument of learned counsel for the accused is regarding the failure of the prosecution to tender the s. 112 statement of the accused's wife. In this regard, s. 114(g) of the Evidence Act provides that the court may presume that evidence which could be and is not produced would, if produced, be unfavorable to the person who withholds it. Now, the general principle is that the prosecution has a complete discretion as to the documents or exhibits to be produced at the trial. Having regard to the circumstances of the present case, it is my view that the statement of the accused's wife is not essential to the unfolding of the account of the prosecution case to establish proof against the accused beyond all reasonable doubt. Nevertheless, at the trial the defence can ask the relevant prosecution witnesses concerning all the documents or exhibits in the possession of the prosecution. In the same way, the defence could have easily demanded PW6, the investigating officer whilst under cross-examination to produce or tender the statement at the trial. There is no basis to suggest that the prosecution had withheld or suppressed the statement in their possession so as to raise an adverse inference under s. 114(g) of the Evidence Act 1950. Adverse inference can only be drawn if there is withholding

or suppression of evidence (see: *Munusamy Vengadasalam v. Public Prosecutor* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221). That being so, in my view, the non-production of the statement of the accused's wife has also not succeeded in raising a reasonable doubt on the prosecution case.

[37] In the end, I am wholly convinced that at the material time and place, without a doubt, the accused knew he was carrying drugs in the car. In my judgment the totality of the evidence, the surrounding circumstances and the conduct of the accused when taken together irresistibly point to the accused having knowledge of the offending exhibits at the material time.

[38] To sum up, having considered and examined each and every one of the evidence in the present case in its entirety from all points of view, I found that the evidence did not leave any questions unanswered and for this reason it is my judgment that the accused has not raised any reasonable doubt on the prosecution case. And that the accused has failed on a balance of probabilities to rebut the presumption of trafficking under s. 37(da) of the Act. In actual fact, the accused at the material time was carrying in his car the drugs from one point to another. The accused was without a doubt a drug trafficker within the meaning of the Act.

[39] I therefore find that the prosecution has proved its case against the accused beyond reasonable doubt for the offence (the first charge) with which he is charged; he is guilty as charged and is convicted thereof.

[40] I impose the only sentence allowed by law, that is to say, I hand out the mandatory sentence of death. I further direct that pursuant to s. 277 of the CPC the accused be hanged by the neck till he is dead.